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# AG Mengozzi's conclusion in *X and X v. Belgium* on the positive obligation to issue humanitarian visas A legitimate plea to ensure safe journeys for refugees Evelien Brouwer

## Introduction – Findings of the Advocate General

On 7 February 2017, Advocate General (AG) Paolo Mengozzi published his opinion in the case *X and X v Belgium*, C-638/16 PPU, in which he concluded that EU member states have a positive obligation to issue a humanitarian visa to Syrian families based on the Visa Code and their obligations under Article 4 of the EU Charter on Fundamental Rights (CFR) to protect individuals against inhuman and degrading treatment or torture. Even if there may be doubts whether the Court of Justice of the European Union (CJEU) will follow the reasoning of the AG, his conclusions have been welcomed by many who criticise the current EU governments for their lack of an effective and humanitarian response to the current refugee crisis.<sup>1</sup>

The case, which was submitted by the Belgian immigration court (Raad voor Vreemdelingenbetwistingen) to the CJEU on 8 December 2016, concerned an application for a humanitarian visa for a Syrian family submitted to the Belgian embassy in Beirut (Lebanon). The application had been

<sup>1</sup> Violeta Moreno-Lax, "Asylum Visas as an Obligation under EU law: Case C-638/16 PPU, X, X v. État belge (Part I and II)" (<http://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge/>) and Maximilian Steinbeis, "Visa für Aleppo", VerfBlog, 2017/2/07 (<http://verfassungsblog.de/visa-fuer-aleppo/>), DOI: <http://dx.doi.org/10.17176/20170208-092501>; Margarite Zoetewij-Turhan and Sarah Progin-Theurkauf, "AG Mengozzi's Opinion on Granting Visas to Syrians from Aleppo: Wishful Thinking?" (<http://europeanlawblog.eu/2017/02/14/ag-mengozzis-opinion-on-granting-visa-to-syrians-from-aleppo-wishful-thinking/>) and Jean-Yves Carlier and Luc Leboeuf *The X. and X. case: Humanitarian visas and the genuine enjoyment of the substance of the rights, towards a middle way?* (<http://eumigrationlawblog.eu/the-x-and-x-case-humanitarian-visas-and-the-genuine-enjoyment-of-the-substance-of-rights-towards-a-middle-way/>).

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rejected by the Belgian authorities based on the argument that it lacked any humanitarian grounds.<sup>2</sup> In a parallel case before the same court, the Belgian Secretary of State for Asylum and Migration, Theo Francken, had been ordered to issue a short-term visa to a Syrian family in comparable circumstances, under a penalty of a fine of €4,000 for every day the immigration authorities would fail to issue the visa. When Francken refused to execute this order, preferring to pay a large sum of money rather than allow this case to become a precedent, the court's order was later suspended by the Brussels' Court of Appeals, awaiting the outcome of the preliminary procedure at stake, in the case *X and X*.<sup>3</sup>

This latter case, which now awaits the judgment of the CJEU, focuses on the interpretation of Article 25 (1) (a) of the Visa Code (Regulation 810/2009) in connection with the member states' obligation under Article 4 CFR. Article 25 (1) (a) of the Visa Code states that "exceptionally" member states should issue a visa with territorial limited validity (TLV visa) when "the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations". In its first question to the CJEU, the Belgian court asked whether the words "international obligations" in Article 25, encompass the whole body of rights as protected by the CFR, and in particular Articles 4 and 18, and whether they cover the obligations of member states under the European Convention on Human Rights (ECHR) and Article 33 of the Refugee Convention on non-refoulement. Secondly, the Belgian court wanted to know whether this means that member states, taking into account their margin of appreciation with regard to the circumstances of each case, are obliged to issue a TLV visa on the basis of Article 25 of the Visa Code, when there is a risk of violation of Article 4 and/or 18 CFR. As a third question, the Belgian court inquired whether the existence of specific ties between the applicant and the member state in question, e.g. family relations or sponsorship, would change the answers to these questions.

With regard to the first question, the AG concludes in the affirmative: yes, Articles 4 and 18 CFR apply to the decision-making on the basis of Article 25 of the Visa Code and yes, these EU law obligations incorporate international law obligations as based on the ECHR and the Refugee Convention. The AG also answers the second and most important question in the affirmative: yes, there is an obligation to issue a short-term visa with territorial limited validity on the basis of Article 25 Visa Code where there are serious grounds to believe that refusal to issue a visa would directly result in the applicants being subjected to a treatment prohibited by Article 4 CFR and would prevent them from their only legal resource to enjoy his or her right to apply for international protection. Dealing with the third and final question, the AG briefly states that member states are

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<sup>2</sup> In fact, in their application, the (Orthodox Christian) applicants submitted evidence showing that one member of the family had been tortured, reported that they were denied the right to register in Lebanon as asylum seekers and noted that the borders between Lebanon and Syria had been closed. Furthermore, at that time, the recognition rate of asylum applications by Syrians in Belgium was 97.6% and the Belgium authorities were following a policy of issuing humanitarian visas to Syrians. Apparently this policy was only stopped in the summer of 2016, owing to a lack of staff.

<sup>3</sup> All relevant judgments (partially in Dutch and French) can be found at <http://kruispuntmi.be/nieuws/dvz-veroordeeld-tot-afgifte-humanitair-visum-type-c-aan-syrisch-gezin>.

under these obligations, irrespective of whether or not there are any ties between the applicant and the member state in question.

Regardless of whether the CJEU will follow the AG or not, these conclusions will remain important for future discussions dealing with the responsibilities and legal duties of the EU and the EU member states towards the current refugee crisis. His opinion is worth reading and rereading again, not only because of the legal reasoning applied for his conclusions, but also for his implied indignation about the lack of empathy and will on the part of EU's governments to take up their responsibilities towards the victims of mass violence and persecution outside the borders of the EU and of human trafficking. AG Mengozzi explicitly states that his conclusions are based on "thorough reflections" taking into account the universal values on which the European Union is based, including the protection of the fundamental rights of the most vulnerable persons and their right to international protection.

He underlines that these values should be protected both within the territory of the EU member states as well as in their relations with third states.<sup>4</sup> According to the AG, the credibility of the EU and its member states is based on implementing precisely these EU rules, such as Article 25 (1) (b) of the Visa Code law, which have been adopted to ensure these values. Dealing with the submissions of the 14 member states, including Belgium, which attended the oral hearings in this case on 30 January 2017 and argued that the obligation to issue humanitarian visas would result in the obligation to admit everyone "living in a catastrophic situation" and would result in a "uncontrollable flood of visa applications" at the embassies, the AG refers again to the specific situation of this Syrian family with minor children, falling under the absolute protection of Article 4.<sup>5</sup> Second, he points to the existing framework established by the EU member states to deal with "mass influx of migrants", in the Directive 2001/55 on Temporary Protection, emphasising that this has actually been established to deal with exceptional circumstances.<sup>6</sup> Third, he puts the fear of member states of receiving large numbers of applications at their embassies in perspective, by describing the practical problems migrants routinely face in travelling and obtaining access to the EU embassies in Beirut.

This contribution focuses on three main subjects: i) the extraterritorial application of the CFR, ii) the responsibility of member states under Article 4, CFR and iii) the question of when or in which circumstances does the discretionary power in Article 25 Visa Code become a positive obligation.

### The Visa Code and extraterritorial application of the CFR

During the hearing, both the Commission and the attending member states submitted that neither the Visa Code nor the CFR applies to the present case, arguing that the issuance of humanitarian visas is a matter of national sovereignty not covered by the rules on short-term visas as provided

<sup>4</sup> See para. 165-168 of his conclusion, where he also refers to Article 3 (1) and (5) of the Treaty on the European Union. The translation from French to English in this contribution is made by the author.

<sup>5</sup> Para. 169-173.

<sup>6</sup> Para. 171.

in the Visa Code. In his opinion, the AG refutes this, paraphrasing comparable conclusions of the ECtHR (European Court on Human Rights) dealing with the ECHR, by stating that the goal of the CFR is to protect rights that are not theoretical or illusory, but concrete and effective.<sup>7</sup> Generally, considering the absolute right of protection against inhuman or degrading treatment or torture, the interpretation of Article 4 CFR follows the scope of 3 ECHR, including its interpretation by the ECtHR.

Nevertheless, in assessing the extraterritorial application of the CFR, it is important to emphasise the important difference between the functioning of the ECHR and the CFR. To make states recognise their extraterritorial responsibilities under the ECHR, case law of the ECtHR was needed to clarify when exactly an individual falls under the jurisdiction of this state, in accordance with Article 1 ECHR.<sup>8</sup> Developing further its conclusions in earlier judgments, the ECtHR in *Hirsi Jamaa* defined two situations of jurisdiction in the meaning of Article 1 ECHR: first, if national authorities of that state employ effective control or authority with regard to territory or individuals abroad, and second, if it involves activities of the state through their diplomatic or consular agents abroad or on-board of crafts and vessels under the flag of that state.<sup>9</sup> Here the extra-territorial responsibility of states follows from their de jure or de facto jurisdiction under the ECHR, also based on the premise that states should not be allowed to take actions outside their territory that they are prohibited from taking inside.<sup>10</sup>

When dealing with the obligations of member states under the CFR, however, the extraterritorial application is implied in Article 51 (1) CFR itself. According to this provision, member states are bound by the CFR when they are implementing or executing EU law, irrespective of whether these actions take place in or outside EU territory. In other words, the provisions of the Charter address the EU institutions and member states when applying EU law, “independent of any criterion of territoriality”.<sup>11</sup> Instead of the question whether actions of the member states fall within their jurisdiction as under the ECHR, in EU law it is the scope of EU law and the principle of effectiveness that defines the applicability of the CFR.<sup>12</sup>

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<sup>7</sup> Para. 158.

<sup>8</sup> See James C. Hathaway and Thomas Gammeltoft-Hansen, “Non-Refoulement in a World of Cooperative Deterrence”, Law & Economics Working Papers, Art. 106 [2014], p. 29 ff ([http://repository.law.umich.edu/law\\_econ\\_current/106](http://repository.law.umich.edu/law_econ_current/106)) and Violeta Moreno-Lax, “Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?”, *Human Rights Law Review* 12: 3, pp. 574-598 and in her aforementioned blog “Asylum Visas as an Obligation under EU law: Case C-638/16 PPU, X, X v. État belge (Part II)” <http://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge-part-ii/>.

<sup>9</sup> *Hirsi Jamaa v Italy* para. 73-75 with references to the earlier judgments *Bancovic and Others v. Belgium and Others* No. 52207/99, 12 December 2001 and *Al-Skeini and Others v. United Kingdom* No. 55721/07, 7 July 2011.

<sup>10</sup> Phrased as the ‘double standard test’ by judge Pinto de Albuquerque in his concurring opinion to the *Hirsi Jamaa* judgment, stating ‘A State also lacks good faith when it engages in conduct outside its territory which would be unacceptable inside in view of its treaty obligations’.

<sup>11</sup> Para. 89 of the opinion.

<sup>12</sup> See also Violeta Moreno-Lax and Cathryn Costello, “The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model”, in S. Peers et al. (eds), *Commentary on the EU Charter of Fundamental Rights*, Oxford: Hart Publishing, 2014, pp. 1657-1683.

This implication of Article 51 (1) CFR for the extraterritorial protection of fundamental rights in the framework of EU law has been recognised by the CJEU in judgments dealing with the right to privacy and data protection. In the *Schrems* and the *Digital Rights Ireland* cases, the CJEU already affirmed that the protection of the right to privacy and data protection, as included in Articles 7 and 8 CFR, would be rendered meaningless if the implied obligations of the member states would stop at the external borders of the EU.<sup>13</sup> In *Digital Rights Ireland*, the CJEU annulled the data retention Directive because of its massive powers of collecting and using personal data of individuals and its general lack of sufficient safeguards. Dealing with the right to supervisory control as included in the right to data protection, the CJEU found that: "..., it should be added that that directive does not require the data in question to be retained within the European Union, with the result that it cannot be held that the control, explicitly required by Article 8(3) of the Charter, by an independent authority of compliance until the requirements of protection and security are fully ensured.

Such a control, carried out on the basis of EU law, is an essential component of the protection of individuals with regard to the processing of personal data." In this case, it was exactly because of the lack of extraterritorial guarantees for a supervisory control mechanism in order to safeguard the right to data protection, the CJEU found that the right in Article 8 (3) CFR had been violated. Comparably, in *Schrems*, dealing with the question whether the Data Protection Directive 95/46 applied with regard to data outside the EU, the CJEU held: "If that were not so, persons whose personal data has been or could be transferred to the third country concerned would be denied the right, guaranteed by Article 8(1) and (3) of the Charter, to lodge with the national supervisory authorities a claim for the purpose of protecting their fundamental rights".<sup>14</sup>

Furthermore, the question of extraterritorial application of the CFR has been dealt with by the General Court in the case of *Front Polisario v. Council* dealing with the EU-Morocco Trade Agreement.<sup>15</sup> Addressing the obligations of the EU Council when concluding such a bilateral agreement with a third state, the General Court pointed to the extraterritorial implications of such treaty for the fundamental rights of those persons who are abroad and affected by the consequences of this Agreement, namely the inhabitants of the Western Sahara who would fall under the scope of this treaty, according to the organisation Frente Polisario.

The General Court explicitly referred to the extraterritorial application of the rights to human dignity, life and personal integrity (Articles 1 to 3), the prohibition of slavery and forced labour (Article 5), professional freedom (Article 15), business freedom (Article 16), the right to property (Article 17), and the right to fair and equitable working conditions including the prohibition of child labour and protection of young people at work (Articles 31 and 32). Deciding on appeal of the Council, the Grand Chamber of the CJEU no longer examined the extraterritorial scope of the CFR,

<sup>13</sup> CJEU 8 April 2014, *Digital Rights Ireland Ltd v. Ireland* C-293/12 and C-594/12. CJEU 6 October 2015, *Schrems v. Data Protection Commissioner*, C-362/14.

<sup>14</sup> Para. 58.

<sup>15</sup> T-512/12, para. 227-228.

finding the claim inadmissible because of lacking *locus standi*.<sup>16</sup> Based on the reasoning that the Treaty as agreed between the EU and Morocco did not apply to the territory of the Western Sahara following international law principles, the CJEU found that Frente Polisario had no standing in its claim with regard to the violation of rights of individuals outside the scope of that treaty. However, this conclusion does not contradict the possible effects as addressed by AG Wathelet in this case of bilateral treaties signed by the EU to individuals outside the EU, but falling within the scope of the agreement.<sup>17</sup>

## Responsibility of the member states under 4 CFR

When dealing with the responsibility of member states to prevent violation of Article 4 CFR, the AG Mengozzi points to the analogue meaning of the right protected in Article 3 ECHR and 4 CFR, based on Article 52 (3) CFR. The AG refers to the famous *Hirsi Jamaa v Italy* judgment of the ECtHR, stressing the absolute protection of 3 ECHR, “even in the most difficult circumstances such as the fight against terrorism and organized crime and increasing numbers of migrants and individuals in search of international protection, also against the background of economic crisis”, as its extraterritorial application.<sup>18</sup> Both the Italian push-back actions at sea in the *Hirsi Jamaa* case and the visa rejection at the Belgian embassy in Beirut in the current case concerned the risk of direct and indirect refoulement. In *Hirsi Jamaa*, the ECtHR found that the prohibition of direct refoulement was violated because of the expulsion of the applicants to Libya and the prohibition of indirect refoulement because of the threat of expulsion to Somalia. In previous judgments, the CJEU emphasised the absolute nature of the right in Article 4 CFR, arguing that this not only requires a rigorous scrutiny of national authorities, including courts, when assessing claims of risk of torture or inhuman or degrading treatment, but it also may engage positive obligations of the member states.<sup>19</sup>

In the current case, the AG applies exactly these principles to conclude there is a positive obligation under Article 25 of the Visa Code to issue a territorial limited visa. As the AG points out, there was no prospect for the Syrian family to receive international protection in Lebanon, taking into account not only the high number of Syrians in Lebanon, but also the fact that Lebanon is not a signatory to the Refugee Convention and the Lebanese government had informed the UNHCR it would no longer register any new applications from Syrian refugees. This means that many Syrians stay in Lebanon under precarious circumstances, without adequate housing and with no access to basic facilities such as water, food, and health care. Furthermore, reports from NGOs indicate that

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<sup>16</sup> CJEU 21 December 2016, C-104/16P, *Council v Front Polisario*.

<sup>17</sup> See Eyal Benvenisti, *The E.U. Must Consider Threats to Fundamental Rights of Non-E.U. Nationals by its Potential Trading Partners*, in his blog of 13 December 2015nat <http://globaltrust.tau.ac.il/the-e-u-must-consider-threats-to-fundamental-rights-of-non-eu-nationals-by-its-potential-trading-partners/>

<sup>18</sup> See para. 138 of the opinion, where AG Mengozzi refers to ECtHR *Hirsi Jamaa v Italy*, 23 February 2012, no 27765/09.

<sup>19</sup> *Aranyosi and Caldaru*, C-404/15 and C-659/15 PPU, dealing with the European Arrest Warrant, and *N.S. v. SSHD* C-411/10 and C-493/10 dealing with the Dublin Regulation, referred to by AG Mengozzi in para. 139.



Syrians with Christian confession risked discrimination and violation because of their religion, making their stay in Lebanon even more difficult.<sup>20</sup>

The AG firmly rejects any alternative on the basis of which the positive obligation for member states to issue a humanitarian visa could be denied in these circumstances: “Staying in Syria? Unthinkable. Turning back to the smugglers without any scruples for putting the asylum seekers’ life in danger, trying to reach for the coast of Italy and Greece? Intolerable. Accept to remain in Lebanon as irregular refugee without any perspective of international protection, even with the risk of refoulement to Syria? Unacceptable.”<sup>21</sup>

### Discretionary power as a rule, but positive obligation as an exception

The wordings of Article 25 and the limited territorial validity of the visa at stake make clear that it leaves a margin of appreciation to member states to decide when and to whom a visa will be issued. However under present circumstances, based on a systemic reading of Article 25 (the member state should issue in case of international obligation), combined with the responsibilities under 4 CFR and the obligations deriving from the Schengen Borders Code, this discretionary power may turn into a positive obligation. As stated above and underlined by the AG, dealing with the application for a humanitarian visa by the Syrian family on the basis of the Visa Code, the Belgian authorities were bound by the CFR, including Article 4. This implies that if rejecting a visa would result in a direct or indirect risk of refoulement, member states have the positive obligation to protect individuals against inhuman or degrading treatment, or refoulement.

Aside from the CFR, this obligation also follows from the rule that visa refusals on the basis of the Visa Code must be in accordance with the conditions and principles as included in the Schengen Borders Code (Regulation 399/2016). The CJEU confirmed in the *Koushkaki* judgment that a decision to refuse a visa cannot be based on other grounds as provided in the Visa Code, as this Regulation provides an exhaustive list of refusal grounds.<sup>22</sup> Article 21 Visa Code provides that when examining an application for a short-term visa, the authorities must ascertain whether the entry conditions set out in Article 6 of the Schengen Borders Code or Regulation 399/2016 are fulfilled. These conditions include the protection of the rights of refugees and non-refoulement.

First, Article 3 of the Schengen Borders Code provides in general that this Regulation must apply “without prejudice to the rights of refugees and persons requesting international protection, including non refoulement”. Second, Article 6 (5) explicitly states that third-country nationals who do not fulfil one or more of the conditions “may be authorised by a member state to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations”.<sup>23</sup> From the wording “may” in this provision one could submit that this concerns a

<sup>20</sup> See para. 154 Opinion AG Mengozzi.

<sup>21</sup> Opinion, para. 157.

<sup>22</sup> CJEU 19 December 2013, C-84/12, *Koushkaki*, para 65.

<sup>23</sup> See also the advice submitted in this case, Thomas Spijkerboer, Evelien Brouwer and Yussef Al Tamimi, Advice in Case C-638/16 PPU on prejudicial questions concerning humanitarian visa, 5 January



discretionary power. However, dealing with “international obligations” and taking into account the aforementioned Article 3 of the Schengen Borders Code, it is clear that there is no discretionary power for member states when dealing with the rights of refugees and the absolute right of non-refoulement.

Finally, the conclusion that there is a positive obligation in cases such as the Syrian refugees, follows from preamble 29 of the Visa Code, which states that the Visa Code respects fundamental rights and observes the principles recognised “in particular” in the ECHR and the EU Charter of Fundamental Rights. This includes the right to non-refoulement as guaranteed under Article 3 of the ECHR and Article 4 of the Charter and the right to asylum guaranteed under Article 18 of the Charter.

During the procedure, Belgium referred to the addition in Article 21 (1) of the Visa Code, according to which member states should give particular consideration “to assessing whether the applicant presents a risk of illegal immigration or a risk to the security of the member states and whether the applicant intends to leave the territory of the member states before the expiry of the visa applied for”. It was argued that based on this latter requirement, the authorities were even obliged to refuse a visa, considering that the Syrian family applied for a humanitarian visa in order to be granted, or at the least to apply for international protection in Belgium.

As this would automatically imply they would overstay their short-term visa, this should be considered as a ground for refusal, as included in Article 32 (1) (b). This of course is based on a very illogical reading of the Visa Code, implying that it would include contradictory provisions. As we have seen, Article 25 explicitly provides that member states should issue a ‘territorial limited visa’ if considering this necessary on the basis of international obligations. Assuming that the issuing of a short-term visa with the goal to be granted a long-term refugee status in the member state of choice, this in itself would be grounds for refusal on the basis of Article 21 cq. 32, which would render the addition in Article 25 meaningless.

The necessity to differentiate between a discretionary power of member states to issue a residence permit either on empathy or humanitarian grounds and the obligation to grant protection to those who qualify for international protection on the basis of the EU qualification Directive has been stressed by the CJEU in *M’Bodj v. België*.<sup>24</sup> Dealing with the Syrian asylum seekers, it is clear that they fall under the definition of ‘international protection’ risking that their claim might be rejected at the embassy as a treatment in violation of Article 4 CFR. Again, it is because of the obligation of the member states to prevent such violation of Article 4 CFR, that a short term and territorial limited visa should be granted in order to allow these persons to apply

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2017(<http://thomasspijkerboer.eu/crisis-european-refugee-law-academic/advice-to-the-cjeu-on-prejudicial-questions-concerning-humanitarian-visas/>).

<sup>24</sup> *M’Bodj v. Belgium*, C-542/13, 18 December 2014, point 46 as well as *B and D v. BAMF*, 9 November 2010, joined cases C-57/09, point 118.

for asylum in Belgium.<sup>25</sup> This clarifies that their situation is different from individuals applying for a humanitarian visa but towards whom EU member states are under no duty to protect them against direct or indirect violation of 4 CFR. This is also the reason why both the AG and commentators have pointed out that if the CJEU is to follow the AG, this will not open 'floodgates' of migrants. First, as the AG submits in para 172, there are still too many practical barriers for refugees in order to reach embassies. Second, as mentioned above, the risk of violating Article 4 CFR only applies to a limited group of refugees.

## Conclusion

The current preliminary procedure *X and X v Belgium* offers an important opportunity to confirm the legal responsibilities of EU member states towards individuals who are in clear need of international protection and whose life is further endangered as a consequence of the absence of legal venues of migration and the ongoing fortification of the EU's external borders. In international law, diplomatic asylum and the issuing of humanitarian visas are considered as belonging to the national sovereignty of states, although this prerogative of states has been challenged over the years, emphasising the shared and global responsibility of states to protect refugees and to ensure the practical enforcement of rights for those whose lives and freedoms are at stake. In the New York Declaration for Refugees and Migrants of September 2016, the General Assembly and the heads of states of the United Nations reaffirmed the principles of the Refugee Convention and the rights of refugees and agreed upon the necessity to ensure safe migration.<sup>26</sup> Launching the adoption of a "global compact for safe, orderly and regular migration" during the intergovernmental conference to be held in 2018, this declaration will hopefully be used as a new impetus to adopt effective and solid mechanisms of international protection at a more global level.

At the EU level, the positive obligation can be derived directly from Article 25 (1) of the Visa Code, read and applied in conformity with Articles 4 and 18 of the CFR, and the implied obligations to respect the rights of international protection and non-refoulement in the Schengen Borders Code. A clear answer of the CJEU to the questions of the Belgian Court with regard to this obligation would provide an important tool to remind EU member states of their legal responsibilities under EU and international law.<sup>27</sup> AG Mengozzi provided not only the legal grounds, but also a convincing moral appeal for such clarification.

<sup>25</sup> In fact, already in 2014, the administrative court in Nantes found that on the basis of the French constitutional right to asylum, there was a positive duty to issue a short term visa to a Syrian family in Beirut in order to enable them to apply for asylum in France., TA Nantes (ord.) 16 September 2014, *Mme K. et autres*, no. 1407765 .

<sup>26</sup> New York Declaration for Refugees and Migrants 19 September 2016, United Nations A/Res/1/71.

<sup>27</sup> See Ulla Iben Jensen, Humanitarian visas: option or obligation?, Study for the European Parliament (Policy Department for Citizens' Rights and Constitutional Affairs), September 2016 ([http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL\\_STU\(2014\)509986\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU(2014)509986_EN.pdf)), where she describes the different policies in the EU member states and the unclear provisions of the current Visa Code).



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